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SUPREME COURT, U. S.
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Supreme Court of the United States

October Term, 1972

No. 72-519

AMERICAN MANNEX CORPORATION,
Petitioner

versus

CHARLTON P. ROZANDS, ETC., ET AL.,
Respondents

PETITON FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No.

AMERICAN MANNEX CORPORATION,
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CHARLTON P. ROZANDS, ETC., ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMERICAN MANNEX CORPORATION, petitioner, prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 28, 1972, holding that petitioner is estopped from suing for refund of ad valorem personal property taxes collected from petitioner by four parishes in the State of Louisiana for the years 1967, 1968 and 1969, by an earlier decision in the Louisiana Supreme Court, involving petitioner and two of the four respondents involved herein, which upheld the legality of the ad valorem personal property taxes collected by two of the parishes, on similar property, for the year 1966 despite the provisions of the Import-Export Clause of the United States Constitution (Article I, Section 10, clause 2).

I

OPINIONS BELOW

The opinion of the Court of Appeals, rendered on June 28, 1972, has not yet been reported. The opinion of the District Court is reported at 328 FS 940. Copies of these two opinions and the two unreported opinions of the District Court are reproduced in the Appendix hereto.

II

JURISDICTION

The judgment by the Court of Appeals was dated and entered on June 28, 1972, and a timely petition for rehearing was denied on August 22, 1972. Jurisdiction of this Court is invoked under 28 USC 1254(1).

III

QUESTION PRESENTED

Whether the federal courts are foreclosed from entertaining petitioner's suit, based on the applicability of the Import-Export Clause to certain property imported by petitioner, for refund of ad valorem property taxes imposed on that property and collected from petitioner by four parishes in the State of Louisiana for the years 1967, 1968 and 1969, by an earlier decision of the Louisiana Supreme Court in a suit involving petitioner and two of the four respondents herein, in

which that court held that the Import-Export Clause did not prevent imposition and collection by two of the parishes of the ad valorem property taxes for the year 1966 on property similiar to, but different from, that taxed in the later years here involved.

The Court of Appeals upheld the District Court's determination that the question of the constitutionality, under the Import-Export Clause, of the imposition of the ad valorem property taxes on certain tubular steel oil-well casing imported by petitioner, for the years 1967, 1968 and 1969 would be considered by Louisiana courts to have been settled under the doctrine of "judicial estoppel", since the Louisiana Supreme Court had previously held that the Import-Export Clause did not preclude imposition of such taxes on similar but different property for the year 1966. The Court of Appeals reached this decision notwithstanding its concession that the causes of action in the instant case and in the earlier-tax-year case previously decided by the Louisiana Supreme Court were "admittedly different", and its recognition that the former action involved only two of the four respondents involved herein.

The Court of Appeals further held that this Court's decision in *Commissioner vs Sunnen*, 333 US 591 (1948), did not require a different result, reasoning that no competing federal interest or policy existed to prevent application of the Louisiana judicial-estoppel doctrine and, in addition, there had been no change in the significant facts respecting petitioner's operation concerning the imported property in question, and no sig-

nificant legal development relevant to the constitutional issue of the applicability of the Import-Export Clause had occurred, since the earlier-tax-year case was decided by the Louisiana Supreme Court.

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 10, clause 2:

> "No State shall, without the Consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . ."

United States Code, Title 28, Section 1331(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arise under the Constitution, laws, or treaties of the United States."

Louisiana Civil Code, Article 2286:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be

the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

V

STATEMENT OF THE CASE

Petitioner seeks to maintain this suit for recovery of ad valorem property taxes in the aggregate amount of $49,359.31 collected from it by respondents (four sheriffs who are ex officio tax collectors, herein collectively called "respondents") based on assessments levied on imported oil-well casing which petitioner claims is exempt from local taxation.

Petitioner imported from Canada tubular steel oil-well casing, which was shipped directly from abroad, to various public warehouses in Concordia, Jefferson, St. Mary and Terrebonne Parishes, Louisiana, where it was held in storage for petitioner's account.

Based on assessments of this oil-well casing held in public-warehouse storage on applicable valuation dates, respondents collected from petitioner ad valorem property taxes for 1969 in Concordia Parish, for 1968 and 1969 in Jefferson Parish, for 1969 in St. Mary Parish and for 1967, 1968 and 1969 in Terrebonne Parish.

Within the provisions of 28 USC 1331(a), petitioner instituted this refund suit for recovery of these taxes for 1967 through 1969 on the grounds that, under the

Import-Export Clause, the assessed oil-well casing in the original form in which imported was exempt from local taxation.

Previously, in 1966, petitioner had sued in state court[1] to enjoin the collection of ad valorem personal property taxes for 1966, assessed, for Jefferson and Terrebonne Parishes and the City of Houma, against certain imported tubular steel oil-well casing held for petitioner's account in public warehouses in those jurisdictions. In March, 1968, the Supreme Court of Louisiana affirmed the trial court's decision that only those joints of imported casing comprising unbroken shipments, as identified by the bills of lading, were held in "original unbroken packages" and not subject to tax, and that the remainder could be subjected to local taxation.[2]

Respondents sought the dismissal of the present suit on grounds of res judicata and estoppel by judgment in light of petitioner's earlier state-court litigation against two of the present four respondents, but the District Court, in its opinion dated March 10, 1970, denied respondents' motion to dismiss on either of those grounds. Appendix, page 47 herein.

In its opinion dated January 11, 1971, the District Court, after recognizing that it had already determined that neither res judicata nor collateral estoppel prevented petitioner from litigating the constitutional

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[1]Suit was tried in the 24th Judicial District Court for the Parish of Jefferson, Division "A", Number 102-201.

[2]*American Manufacturing Corporation vs Cronvich*, 251 La. 1014, 207 So.2d 778 (1968). Petitioner did not seek review of this decision by the United States Supreme Court.

merits of the case, went on to decide the case on its merits, rejecting respondents' unit-of-transportation (bill-of-lading) theory, and holding that petitioner was entitled to recover its taxes on the grounds that petitioner's imported casing, which was never in a package, remained in its original form and exempt from local taxation. Appendix, pages 37, 41 and 42 herein.

Except for a showing in the present suit that a substantial part of petitioner's imported oil-well casing was subsequently sold and shipped in 1967, 1968 and 1969 to customers at specific locations within states other than Louisiana and the absence, in the prior state-court litigation, of any showing in that regard with respect to other but similar casing sold and shipped by petitioner in the year 1968, petitioner's operations in 1966 were substantially similar to those in 1967, 1968 and 1969.

Subsequently, the District Court reopened the case and, in its opinion dated June 7, 1971, concluded that, although under the widest scope of res judicata recognized in Louisiana the issue in the present litigation is not determined by the prior state-court litigation, the Louisiana Supreme Court would find that a doctrine of judicial estoppel that is broader than res judicata strictly applied exists in Louisiana as a supplement to res judicata so as to foreclose this present suit by petitioner, and accordingly denied petitioner's claim for recovery of its taxes. 328 FS at 942-944; Appendix, pages 31, 32 and 35 herein.

The Court of Appeals affirmed the judgment of the District Court, agreeing that "Louisiana would not bar the action as a matter of res judicata, but would consider the Import-Export issue settled between these parties under the Louisiana doctrine of 'judicial estoppel' ". ____ F2d ____; Appendix, page 23 herein.

After referring to the full-faith-and-credit provision of 28 USC 1738, and stating that, "when the parties and the cause of action litigated are the same in state court as in federal court, the doctrine of res judicata has been held to bar federal relitigation, even if a federal constitutional question is in dispute", and that, "similarly, it has been held that the disputed factual or legal issues arising between the same parties cannot be relitigated in federal court after a valid state court determination of the same issues", the Court of Appeals further held that "the result is the same" in Louisiana as in other states, whether the principle is called "judicial estoppel" or "collateral estoppel". ____ F2d at ____; Appendix, pages 23 and 24 herein.

VI

REASONS FOR GRANTING THE WRIT

A — The holding below conflicts with a decision of this Court, rejecting the applicability of the doctrine of collateral estoppel to tax cases involving relevant facts which are separable, although similar or identical, from those on which the cause of action in a previous suit, involving a previous tax year, was based.

The decisions of both the Court of Appeals and the District Court necessarily attempt to avoid the impact of this Court's decision in *Commissioner vs Sunnen*, 333 US 591 (1948).[3] There, as stated by the District Court, "the (Supreme) Court held that in tax cases the estoppel doctrine would be given only a narrow scope in order to prevent an earlier decision from creating an 'undue disparity' in the application of the tax law to different taxpayers". 328 FS at 943; Appendix, page 32 herein.

In the *Sunnen* case, the Board of Tax Appeals had previously adjudicated the taxpayer's income-tax liability for earlier years with respect to patent royalties received by his wife pursuant to a 1928 royalty contract which he had assigned to her. The controversy currently before the Court involved the taxpayer's income-tax liability for subsequent years with respect to two separate situations. The first situation involved royalty payments received by the taxpayer's wife pursuant to royalty contracts other than the 1928 contract, such other contracts having similarly been assigned by him to his wife in later years. The second situation involved further royalty payments received by the taxpayer's wife pursuant to the 1928 contract, during a different tax year than that with respect to which the Board had previously made

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[3]It is well established that, "under Louisiana law, each imposition of a tax may be the subject of a suit for refund regardless of the outcome of any prior suit". *Mississippi River Fuel Corp. vs Cocreham*, 382 F2d 929, 937, fn. 16 (CA 5-1967), cert. den., 390 US 1014; *Hubert vs City of New Orleans*, 116 La. 507, 40 So. 853 (1906). Prior to the decisions of the lower courts herein, no decision based on Louisiana law has ever departed from this principle.

a final adjudication. The question presented to the Court, with respect to each situation, was whether, under the doctrine of collateral estoppel, the earlier decision by the Board precluded later adjudication of the taxpayer's tax liability regarding any of the subsequent royalty payments.

In discussing the principle of collateral estoppel, the Court, in *Sunnen*, stated:

> "[It] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." 333 US at 599.
>
> * * * *
>
> "It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the contolling facts and applicable legal rules remained unchanged." 333 US at 599-600.
>
> * * * *
>
> "[I]f the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court

is free in the second proceeding to make an independent examination of the legal matters at issue." 333 US at 601.

Applying those principles to the first situation before it, the Court held that the "royalty payments growing out of the license contracts which were not involved in the earlier action . . . and which concerned different tax years are free from the effects of the collateral estoppel doctrine. That is true even though those contracts are identical in all important respects with the 1928 contract, the only one that was before the Board, and even though the issue as to those contracts is the same as that raised by the 1928 contract." 333 US at 602.

In passing upon the second situation (involving the subsequent royalty payments pursuant to the 1928 contract), the Court held that, although the complete identity of facts, issues and parties which existed between the earlier Board proceeding and the case currently before the Court would usually compel application of the collateral-estoppel doctrine, the doctrine would not be applied because intervening decisions of the Court had substantially changed the legal basis on which the earlier Board decision was based.

In the instant case, the property on which the tax was levied was not the same as that which was involved in the prior proceeding before the Louisiana Supreme Court. Thus, the facts relevant to the instant case are clearly separable from those of the prior proceeding. Further, the causes of action in the two pro-

ceedings are "admittedly different", as are the tax years involved. Accordingly, under the direct holding and rationale of the *Sunnen* case, it is immaterial whether or not there has been any significant change in the relevant facts or the underlying legal principles subsequent to the prior decision, since the relevant facts in the two cases are clearly separable and the causes of action and tax years involved are different.[4]

However, the lower courts herein failed to distinguish between the two situations presented to the Court in the *Sunnen* case, and held that a significant change in either the relevant facts or underlying legal principles must have occurred in order for collateral estoppel to be inapplicable to the instant case. (See ____ F2d ____ and 328 FS at p. 944; Appendix, pages 25, 26 and 33 herein.) Thus, the decisions of the courts below conflict with the holding of this Court in *Sunnen*, and should be reversed.

B — The court below was manifestly in error in holding that there exists in Louisiana a doctrine of judicial estoppel sufficiently broad to foreclose this action.

Prior to the 1957 decision by the Louisiana Supreme Court in *California Company vs Price*, 234 La. 338, 99 So.2d 743, the Louisiana law was clear that the doctrine of judicial estoppel existed in Louisiana only with respect to three well-recognized instances involving

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[4]The *Sunnen* holding in this respect was followed by the Fifth Circuit in *Jackson vs King*, 223 F2d 714 (CA 5-1955). See also *Pan-Am World Airways vs CAB*, 380 F2d 770 (CA 2-1967), aff'd., 391 US 461.

petitory actions, real-estate partitions and certain injunctions against executory process, none of which is involved here. In all other situations, the subsequent action had to meet the criteria set forth in Louisiana Civil Code Article 2286 in order for the plaintiff to be barred from maintaining his action.[5] It is submitted that the 1957 *Price* decision did not affect that rule of law.

The 1957 *Price* case had been preceded by a 1954 *Price* case,[6] both cases being similar concursus proceedings involving the same parties claiming, on the basis of asserted ownership of certain land acreage covered by certain mineral leases, the oil royalties from production on different wells on the same leased property.

In the 1957 *Price* case, the Louisiana Supreme Court recognized that in the 1954 *Price* case "this Court . . . held . . . that the Price-Beckwith group was the owner of (the acreage) covered by the leases . . . and gave judgment recognizing the Price-Beckwith group as the owner of the funds on deposit as well as all additional funds that may hereafter be deposited, representing the . . . royalty . . . attributable to the production from the "leased acreage, and added that "it is apparent that the conclusion reached by the court

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[5]See *Quarles vs Lewis*, 226 La. 76, 75 So.2d 14, 16 (1954), in which the court stated that "there are only three exceptions to this general rule that res adjudicata does not apply unless there be an identity of demands, parties and cause of action, as prescribed by Article 2286 of the Code".

[6]*California Company vs Price*, 225 La. 706, 74 So.2d 1 (1954).

(in the 1954 *Price* case) was based on the ownership of (the acreage) covered by the leases in order to determine who was entitled to the . . . royalty provided for in the leases". 234 La. 338, 99 So.2d 743, 745 (1957).

Having once before decided among the selfsame parties the selfsame question of ownership of the selfsame leased acreage in the 1954 *Price* case, the Louisiana Supreme Court in the 1957 *Price* case affirmed the judgment of the lower court "sustaining the pleas of res judicata and judicial estoppel".

It is respectfully submitted that, the Louisiana Supreme Court having decided the case by sustaining the plea of res judicata, in light of the presence of identity of parties, demands and causes of action in the 1957 *Price* case, all as required by Article 2286 of the Louisiana Civil Code, the Court's language with respect to judicial estoppel[7] was not necessary to the decision of the case and constituted mere obiter dictum.

In any event, a careful review of the cases cited by the Louisiana Supreme Court as precedent for its

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[7]"Moreover, even if res judicata cannot be strictly applied the parties to this litigation are bound by judicial estoppel which extends to every material allegation or statement made on one side in the prior Price case and denied on the other which was determined in the course of the proceedings." (Emphasis added.) 99 So.2d at 747.

statement that judicial estoppel is recognized in Louisiana indicates clearly that its application is not intended to extend to separate causes of action.[8]

Further, notwithstanding the 1957 *Price* decision, a survey of the cases decided since that decision reveals that no Louisiana court has applied the doctrine of judicial estoppel beyond the aforesaid three well-recognized exceptions.

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[8]In *Heroman vs Louisiana Institute of Deaf and Dumb*, 34 La. Ann. 805 (1882), the second suit involved the same parties (certain heirs and a seizing creditor) and the same cause of action (the alleged invalidity of a sheriff's sale). In *Buillard vs Davis*, 185 La. 255, 169 So. 78, 86 (1936), certain heirs sought to recover inherited property sold to defendants in two transactions, one of which had previously been attacked unsuccessfully by some of the heirs. Since the alleged ground for setting the transactions aside was the same in all suits instituted by the heirs, the causes of action were the same. However, the court held that the judgments in the earlier suits were binding only on the plaintiffs in the later suit "who were also plaintiffs in said [earlier] suits". In *Succession of Fitzgerald*, 192 La. 726, 189 So. 116 (1939), a Nicaraguan court's decision that the daughter of plaintiff's deceased brother, and not plaintiff, was the brother's heir was recognized as res judicata in a Louisiana action involving the brother's succession. *Brown Land & Royalty Co. vs Pickett*, 226 La. 88, 75 So.2d 18 (1954), cert. den., 348 US 929, involved a second petitory action regarding ownership of the same property interest, one of the well-recognized exceptions to the Louisiana strict rule of interpreting the doctrine of res judicata. In *Quarles vs Lewis*, 226 La. 76, 75 So.2d 14 (1954), the court denied a plea of res judicata, pointing out that the demand in the second suit (for damages) was not the same as that in the first suit (for specific performance), and therefore, under Louisiana Civil Code Article 2286, res judicata was not available, even if it were conceded that the defendant's breach of contract gave rise to only one cause of action.

The application of the judicial-estoppel doctrine was considered in *Shell Oil Company vs Texas Gas Transmission Corporation*, 176 So.2d 692 (La. App. 4-1964), in which the court stated:

> "With three exceptions, none of which is applicable here, Louisiana courts always have interpreted Article 2286 *stricti-juris* and have rigidly adhered to the necessary presence of all three requirements. The exceptions are petitory actions, partitions and injunctions to arrest executory process. Quarles v. Lewis, 226 La. 76, 82, 75 So.2d 14, 16; Brown Land & Royalty Co. v. Pickett, 226 La. 88, 91, 75 So.2d 18, 19; Hope v. Madison, 194 La. 337, 343, 193 So. 666, 667-668; Pacific Fin. Co. of Caddo v. Benson, La. App. 149 So.2d 239, 243; Taylor v. Williams, La. App., 107 So.2d 319, 321; Comment, 35 Tul. L. Rev. 609, 618; Comment, 2 La. L. Rev. 491, 512.
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> "We do not understand California Co. v. Price, supra, to hold otherwise. It appears to us that all three requirements of Article 2286 were present in Price and that the same result could have been reached by an application of strict res judicata. The 'judicial estoppel' mentioned in Price, as shown by its reference to that doctrine in the case of Quarles v. Lewis, supra, was not collateral estoppel as we understand it. We believe nothing more can be said for Price and collateral estoppel in Louisiana beyond that the case may have added a

fourth exception, concursus proceedings which involve proceeds derived from real property, or perhaps only from minerals, to our strict construction of res judicata."[9]

Further, although there have been several cases presented to the Louisiana Supreme Court subsequent to its decision in the 1957 *Price* case, in which subsequent cases the doctrine of judicial estoppel could have been applied beyond the three well-recognized exceptions, that court has not seen fit to extend the application of the judicial-estoppel doctrine. Instead, the decision of the Supreme Court in each case has been based solely on the fact that the prerequisites for res judicata set forth in Louisiana Civil Code Article 2286 were lacking.[10]

A good example of the refusal by Louisiana courts to apply the doctrine of judicial estoppel beyond the three well-recognized exceptions is *Giroir vs Dumesnil*, 172 So.2d 89 (La. App. 1-1965), modified, 248 La. 1037, 184 So.2d 1 (1966), in which plaintiff sued to be declared owner of certain land. Defendants pleaded res judicata and judicial estoppel as a bar to the suit. The basis for the pleas was an earlier decision construing a will under which both plaintiffs and defend-

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[9]176 So.2d at 696. Accord: *Rouseo vs Atlas Finance Company*, 167 So.2d 495 (La. App. 4-1964), writ. ref., 246 La. 917, 168 So.2d 824; *Buhler vs Villec*, 117 So.2d 286 (La. App. Orl.-1960), cert. den.

[10]*Williams vs. Marionneaux*, 240 La. 713, 124 So.2d 919 (1960); *Eugene vs Ventress*, 253 La. 840, 220 So.2d 94 (1969); and *Giroir vs Dumesnil*, 248 La. 1037, 184 So.2d 1 (1966).

ants claimed ownership of the property. However, not all of the current defendants were before the court in the prior case.

The Court of Appeal of Louisiana, First Circuit, held that res judicata applied with respect to the defendants who were involved in the prior proceeding, but denied the pleas of res judicata and judicial estoppel with respect to the remaining defendants, stating:

> "Learned counsel for appellants cites and relies upon California Company v. Price, 234 La. 338, 99 So.2d 743, which applied the doctrine of judicial estoppel. Counsel argues that rule announced therein is applicable in the instant case. We note, however, identical parties were involved in the cited authority which held that 'the judgment in such a suit (i.e. a concursus proceeding) adjudicates title to the land or royalty right as *between the defendants who appear and claim it adversely to each other.*' (Emphasis supplied by the Court.)
>
> "In Quarles v. Lewis, 226 La. 76, 75 So.2d 14, which contains a comprehensive review of the various instances wherein the effect of res adjudicata and judicial estoppel have been judicially extended, it is clearly made to appear that these instances relate to cases in which the rule is applied to matters which could have been pleaded but were not . . .

"If res adjudicata is applied to the claims of Mrs. Dumesnil adverse to those heirs not made parties in the former action, a new exception to the rule, namely, one dispensing with the requirement of identity of parties, must be herein established . . .

"We conclude therefore [that] . . . as to the remaining one-half interest claimed by those heirs of Dumesnil who were not represented and made no appearance in . . . the succession proceedings, the plea of res adjudicata should have been overruled." 172 So.2d at 95.

On appeal, the Louisiana Supreme Court upheld the appellate court's decision with respect to judicial estoppel and res judicata, stating that, "to support res judicata the code article requires an identity of parties in the suits. The present defendants were not parties to the previous demand in the succession proceeding. Hence, one of the essential elements of res judicata is lacking. *Though the defendants also interposed a plea of judicial estoppel, we find no basis for this plea.*"[11] (Emphasis supplied.)

Of the present respondents, only the sheriffs of Terrebonne and Jefferson Parishes were involved in the prior proceeding before the Louisiana Supreme Court.[12] In the instant case, however, not only the sher-

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[11]*Giroir vs Dumesnil*, 248 La. 1037, 184 So.2d 1, 5 (1966).
[12]*American Mannex Corporation vs Cronvich*, 251 La. 1014, 207 So.2d 778 (1968).

iffs of Terrebonne and Jefferson Parishes, but also those of Concordia and St. Mary Parishes are made respondents regarding separate causes of action against each of them. Accordingly, under the principles announced in the *Giroir* case, supra, judicial estoppel does not apply in the instant case, and, even if it were assumed that Louisiana courts otherwise would apply this doctrine in this situation, it clearly does not apply to the actions against the sheriffs of Concordia and St. Mary Parishes.

Based on the foregoing, it is submitted that the doctrine of judicial estoppel does not exist in Louisiana beyond three well-recognized exceptions not here applicable, and that, even if it were assumed that it did exist beyond these exceptions, it clearly would not apply in the instant situation so as to bar petitioner's actions against the present respondents, particularly the sheriffs of Concordia and St. Mary Parishes.

The effect of the decisions by the lower courts herein would be to deny petitioner a hearing on a constitutional question of considerable importance — the application of the "original package doctrine" under the Import-Export Clause to merchandise imported in bulk — by reliance on a rule of law not here applicable, in violation of legal principles long established in both federal and Louisiana courts permitting taxpayers to obtain separate judicial scrutiny of their tax liability on separable facts in different tax years.

VII

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals with respect to the question herein presented.

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing petition were served on counsel for respondents by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record at their office at 104 Supreme Court Building, New Orleans 70112.

New Orleans, September , 1972.

H. Paul Simon

APPENDIX

OPINION OF THE COURT OF APPEALS

(Dated and filed June 28, 1972)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2739

AMERICAN MANNEX CORPORATION,
Plaintiff-Appellant,

versus

CHARLTON P. ROZANDS, ETC., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 28, 1972)

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

WISDOM, Circuit Judge: The taxpayers sued in federal district court to contest the imposition of a Louisiana state ad valorem tax on certain of their property for the years 1967, 1968, and 1969. Previously, the same taxpayers had contested in state court the levy of the same tax on the same property for the year 1966, raising the same constitutional objection: that the Import-Export clause of the United States Constitution pro-

tected their property, in its asserted condition of transit, from state taxation. The district court held that the federal suit was barred by the earlier state court determination of the constitutional issue between these same parties. Judge Rubin explained that Louisiana would not bar the action as a matter of res judicata, but would consider the Import-Export issue settled between these parties under the Louisiana doctrine of "judicial estoppel." We agree with the district court's exposition of Louisiana law, and affirm on the basis of its opinion, reported as *American Mannex Corporation v. Prejean*, E.D. La. 1971, 328 F. Supp. 940. We consider it appropriate, however, to add a few words on an issue not discussed at length by the district court: the reason for allowing the Louisiana law of judicial estoppel to determine the effect of the prior Louisiana proceedings upon a subsequent suit in federal court upon an admittedly different cause of action.

The extent to which a federal court must attach conclusive effect to prior state court proceedings is a federal question. *Adam v. Saenger*, 1938, 303 U.S. 59, 64, 82 L.Ed. 649. Section 1738 of Title 28, United States Code, directs that judicial proceedings of the court of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." When the parties and the cause of action litigated are the same in state court as in federal court, the doctrine of res judicata has been held to bar federal relitigation, even if a federal constitutional question is in dispute. *Brown v. Chastain*, 5 Cir. 1969, 416 F.2d 1012, cert. den. 397

U.S. 951, 90 S.Ct. 976, 25 L.Ed.2d 134; accord, *Katz v. State of Connecticut*, 2 Cir. 1970, 433 F.2d 878. Similarly, it has been held that disputed factual or legal issues arising between the same parties cannot be relitigated in federal court after a valid state court determination of the same issues. The principle may be described as one of "judicial estoppel" in Louisiana, see *Friedenthal v. General Insurance Company of America*, 5 Cir. 1968, 395 F.2d 202, 203; *Cauefield v. Fidelity and Casualty Company of New York*, 5 Cir. 1967, 378 F.2d 876; *Seaboard Air Line R. Co. v. George F. McCourt Trucking Inc.*, 5 Cir. 1960, 277 F.2d 593; or "collateral estoppel" in other states. *Vernitron Corp. v. Benjamin*, 2 Cir. 1971, 440 F.2d 105. But the result is the same. In accordance with 28 U.S.C. § 1738, the federal court follows the state rule of repose.

This does not necessarily mean, however, that a federal court is invariably bound to a state's own interpretation of res judicata or judicial estoppel. Other well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738.[1] For example, federal tax policy may dictate limited application of collateral estoppel when there is federal relitigation of a state court determination bearing on federal tax liability. See *Commissioner v. Sunnen*, 1948, 333 U.S. 591, 92 L.Ed. 898. Whether such a competing federal policy might prevail over the policy embodied in section 1738 is a question we need not, and do not, decide today. For it is clear that

[1] See Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 1958, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953; Hanna v. Plumer, 1965, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8.

the present record suggests no federal statutory or constitutional interest to compete with the unequivocal statement embodied in section 1738, no federal interest independent of the basic substantive issue to suggest the need for departure from the Louisiana doctrine of judicial estoppel. Should a case arise, similar to *Sunnen*, where an independent federal interest might support departure from strict adherence to a state rule of repose, a federal question of considerable complexity would be presented.[2] In addition, it should be noted that there has been no change in the significant facts and no significant legal development relevant to this constitutional issue since Mannex submit-

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[2] *Compare, e.g.*, Lyons v. Westinghouse Electric Corp., 2 Cir. 1955, 222 F.2d 184, cert. den. 350 U.S. 825, S.Ct. , L.Ed. , *and* Mach-Tronics Inc. v. Zirpoli, 9 Cir. 1963, 316 F.2d 820, 833 *with* Becher v. Contoure Laboratories, Inc., 1929, 279 U.S. 388, S.Ct. , L.Ed. *and* Connelly v. Balkwill, 6 Cir. 1960, 279 F.2d 685, *aff'g* 174 F. Supp. 49.

See Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1360, 1384 (1967):

> [I]f a federal purpose or interest will be undermined by allowing collateral estoppel effect, as might occur when a determination of law would be given this effect or when the availability of federal procedure is a prerequisite to carrying out the intent of Congress implicit in its definition of the substantive federal claim, a valid reason may exist for denying collateral estoppel effect. In any event, the federal purpose and interest which might be undermined by applying collateral estoppel must be balanced against the policy reasons which support this res judicata doctrine.

See generally Note, The Res Judicata and Collateral Estoppel Effect of Prior State Suits on Actions Under SEC Rule 10b-5, 69 Yale L. J. 606 (1960); Comment, Exclusive Federal Jurisdiction: The Effect of State Court Findings, 8 Stan. L. Rev. 439 (1956).

ted its case to the Louisiana Supreme Court. We express no view as to the appropriateness of today's result in the setting of significant factual or legal change occurring in the interim separating state and federal court adjudication of the same constitutional issue between the same parties.

The application of state law we approve today is state law wrapped in a cocoon of federal law governing the degree of adherence to state law — not unequivocal application of naked state law.

AFFIRMED.

OPINION OF THE DISTRICT COURT

(Dated June 7, 1971; filed June 14, 1971)

AMERICAN MANNEX CORPORATION,
Plaintiff,

v.

Abel P. PREJEAN, Sheriff and Ex-Officio Tax Collector, Parish of Terrebonne, and His Successors in Office,
Defendant,

AMERICAN MANNEX CORPORATION,
Plaintiff,

v.

Charlton P. ROZANDS, Sheriff and Ex-Officio Tax Collector, Parish of Terrebonne, Louisiana, et al.,
Defendants.

Civ. A. Nos. 68-1150, 70-807.
United States District Court,
E. D. Louisiana,
New Orleans Division.
June 7, 1971.

RUBIN, District Judge:

In a suit involving 1966 ad valorem property taxes on imported oil well casing shipped from Canada to Louisiana and stored there awaiting sale, the Louisiana Supreme Court held that the Import-Export Clause of the Constitution[1] did not prevent the imposition of the tax because it considered that, once any part of the original shipment has been sold, all imported merchandise remaining in a warehouse was subject to state taxation. The same taxpayer then filed suit in federal court contesting the constitutionality of the tax as applied in 1967, 1968, 1969. After denying a motion for summary judgment, and after hearing the case on its merits, this court expressed a view of the breadth of the shield afforded by the Import-Export Clause different from that taken by Louisiana's Supreme Court. It stated, that, so long as the imported goods remain in the warehouse in their original form, their protection against local tax does not end merely by the sale of a part of the original shipment; and it applied that interpretation in this suit.

In its motion for reconsideration the state does not attack this court's interpretation of the Constitution.

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[1]U.S. Const. Art. I, §10, cl.2.

But it argues again, as it did at the outset of this suit by motion for summary judgment, that the prior decision is res judicata or at least that it constitutes a collateral estoppel against further litigation.

There is no issue concerning the effect of an adjudication of fact in a prior judicial determination: the facts in both suits were stipulated, and the only issue for ultimate determination is a legal question, the applicability of the Import-Export Clause. There is but one alleged factual difference between the cases. In the prior suit, it was not shown whether all or any of the imported tubular steel oil-well casing was subsequently sold and shipped to customers in other states than Louisiana. Here the stipulation indicates that, of the imported casing stored in public warehouses in Concordia, Terrebonne Parish, St. Mary and Jefferson Parishes, and taxed by the state, 25.3% was shipped to points outside Louisiana in 1967; 21.6% was thus shipped in 1968; and 41.8% went to other states in 1969.

The court that heard the 1966 case was entitled to assume on the facts before it that all of the taxed casing was ultimately destined for, and ended its international travel, in Louisiana. But the court's opinion does not express such an assumption. So it is impossible to state whether, with respect to the years now under consideration, the fact that a substantial part of the imported steel pipe did not end its travel in Louisiana makes this case factually different from the earlier one. Even if this factual difference did exist, however, it should not be decisive of a different result. With all the facts now in the record, the question therefore remains: does the earlier decision preclude further judicial consideration of the issue?

I. RES JUDICATA

The effect of the prior decision as res judicata ought to be determined by the rules of the court that rendered it. James Talcott, Inc. v. Allahabad Bank, Ltd., 5 Cir. 1971, 444 F.2d 451; Restatement (Second), Conflict of Laws, Proposed Official Draft, § 95 (1967). Under a principle of Louisiana law applied in 1906, the determination of the validity of an ad valorem property tax for one year does not have the authority of the thing adjudged when the same taxpayer contests a levy for a subsequent year. Hubert v. City of New Orleans, 116 La. 507, 40 So. 853 (1906). See, also, Mississippi River Fuel Corp. v. Cocreham, 5 Cir. 1967, 382 F.2d 929, 937 n.16, cert. denied Mouton v. Mississippi River Fuel Corp., 390 U.S. 1014, 88 S.Ct. 1264, 20 L.Ed.2d 164 (1968).

Nor is this a random decision. For it follows fundamental principles of res judicata long settled in Louisiana. Article 2286 of the Louisiana Civil Code provides:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

The scope of res judicata thus commanded is narrower than the preclusion given by the prior judgment at common law. Durmeyer v. Streiffer, 1949, 215 La. 585, 41 So. 2d 226; Hope v. Madison, 1940, 194 La. 337,

193 So. 666; Quarles v. Lewis, 1954, 226 La. 76, 75 So.2d 14; see also Lloveras v. Reichert, 1941, 197 La. 49, 200 So. 817. Comment, 2 Louisiana Law Review 491, 492 (1940). The plea is stricti juris, and any doubt as to the identity of the causes of action in the two suits must be resolved against the party who claims that the case has already been determined. Bullis v. Town of Jackson, 1943, 203 La. 289, 14 So.2d 1.

The judgment in the prior suit determined only that the taxpayer was not entitled to an injunction against the collection of 1966 ad valorem property taxes. It did not, indeed it could not, determine American Manex' liability for 1967 taxes or 1968 taxes, or taxes for later years as yet unpaid when the prior suit was commenced even if the facts on which that liability was to be determined remained unchanged.

None of the decisions cited by the state challenges this principle. It is manifest on reviewing them that they involve attempts to secure a different judicial result by relitigating the same cause of action on the same facts once previously determined.[2]

To the extent that Louisiana courts have gone beyond the civilian rule set forth in Article 2286, they have permitted the earlier determination to foreclose later litigation only with respect to matters that "might have been pleaded," but actually were not asserted, in the prior suit.[3] Here there is no contention that the facts in 1966 were the same as they were in 1967 or 1968 or 1969. But even if the acts were no different, the cause

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[2]See, e.g. Rankin v. State of Florida, 5 Cir. 1969, 418 F.2d 482; Grubb v. Public Utilities Commission, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972 (1930).

[3]See, e.g., Quinette v. Delhommer, La. App., 165 So.2d 900 (1964).

of action in the two suits was different. Hence under the widest scope of res judicata recognized in Louisiana the issue in these suits is not determined by the prior litigation.

II. COLLATERAL ESTOPPEL

Until 1957, Louisiana courts had consistently held that the common law estoppel doctrine did not supplement the state's narrow rule of res judicata. See Quarles v. Lewis, 226 La. 76, 75 So.2d 14 (1954). In California Company v. Price, 234 La. 338, 99 So.2d 743 (1957), however, the Louisiana Supreme Court distinguished *Quarles* and held, "[E]ven if res judicata cannot be strictly applied the parties * * * are bound by judicial estoppel which extends to every material allegation or statement made on one side in the prior Price case and denied on the other which was determined in the course of the proceedings." Id. at 747. The *Price* holding has been severely criticized by Louisiana's leading commentator on Civil Procedure. See McMahon, The Work of the Louisiana Supreme Court for the 1957-58 Term, 19 La.L.Rev. 294, 390 (1959). At least two Louisiana Appellate Courts have distinguished *Price* and rejected the existence of the collateral estoppel doctrine. Shell Oil Co. v. Texas Gas Transmission Corp., La. App. 1964, 176 So.2d 692; Rouseo v. Atlas Finance Co., La. App. 1964, 167 So.2d 495. However, the *Price* case is too recent[4] and its holding has been accepted by too many Louisiana Appellate Courts[5] for

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[4]Compare, Moore, Federal Practice, ¶3.09 [1].

[5]Lege v. U.S. Fidelity and Guaranty Co., La. App. 1966, 186 So.2d 670; Coates Equipment and Service, Inc. v. Glover, La. App. 1965, 181 So.2d 455; Giroir v. Dumesnil, La. App. 1965, 172 So.2d 89, 94.

this Court to doubt its continued validity. If, as in a diversity case, the Federal District Court is to determine what the Louisiana Supreme "[C]ourt would do if faced with the question *at this time*,"[6] I must conclude that it would find that a doctrine of judicial estoppel that is broader than "res judicata strictly applied" exists as a supplement to res judicata.

It is unnecessary at this time to determine whether Louisiana's judicial estoppel doctrine is a complete analogue to the common law collateral estoppel doctrine. The facts in *Price* are sufficiently parallel to those in *Mannex* that the "judicial estoppel" doctrine there recognized, however narrow it may be, clearly applies. In *Price* two rival claimants disputed the ownership of certain oil royalties. In the earlier suit different oil royalties for production from the same tract had been disputed by the same parties. In both suits the validity of a land patent given by one claimant to the other was the legal issue contested. As in *Mannex*, identical parties or their privies utilized identical legal arguments to dispute their rights to funds that had accumulated in different years. Thus the judicial estoppel doctrine announced in *Price* forecloses Mannex' suit here.

Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591, 68 S.Ct. 715 92 L.Ed. 898 (1948) does not compel a contrary result. In *Sunnen*, the Court held that in tax cases the estoppel doctrine would be given only a narrow scope in order to prevent an earlier decision from creating an "undue disparity" in the application of the tax law to different taxpayers. Succes-

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[6]Moore, Federal Practice, ¶3.09 [1] (emphasis in original).

sive tax suits would not be governed by collateral estoppel if there was "a subsequent modifcation of the significant facts or a change or development in the controlling legal principles * * * [Collateral estoppel] is designed to prevent repetitious law suits over matters which have once been decided and which have remained substantially static, factually and legally." Id. 68 S.Ct. at 720. The Court implied an even more narrow estoppel doctrine when it said that "if the relevant facts in the two cases are separable *even though they be similar or identical*, collateral estoppel does not govern the legal issues which recur in the second case." Id. at 721. (Emphasis added.) The evident tension in the two statements seems to have been resolved in favor of the former; only where the controlling facts or governing law has changed does the Court re-examine the issue. See Stanback v. Commissioner of Internal Revenue, 4 Cir. 1959, 271 F.2d 514; Alexander v. Commissioner of Internal Revenue, 5 Cir. 1955, 224 F.2d 788; Lynch v. Commissioner of Internal Revenue, 7 Cir. 1954, 216 F.2d 574. Where the facts are identical, though the tax years are different, successive litigation of the same issue is not permitted. A contrary result, permitting the relitigation of identical facts arising under identical legal principles every year that a tax was levied would ill serve the policy of avoiding redundant litigation, affirmed in *Sunnen*, 68 S.Ct. at 720.

Here Mannex suggests no change in the *significant* facts. The existence of the original form or package and the constitutionality of the tax do not turn on the ultimate destination of the casing. Moreover, Mannex points to no "development in the controlling legal prin-

ciples." Though my view of the Import-Export Clause may differ from that of the Louisiana Supreme Court, Mannex has had its day in court. Unable to demonstrate any change in the law or facts, it may not have another.

This result is reinforced by policy considerations. In *Sunnen* the Court said that, where collateral estoppel was inapplicable because of a change in the facts, stare decisis might preclude relitigation where "consistency in decision is considered just and desirable." 68 S.Ct. at 721. The Court of Claims has concluded that, where the parties, the law and the controlling facts remain the same, but the facts are separable in the two causes of action, stare decisis should apply. Powers v. United States, 1970, 424 F.2d 593, 191 Ct.Cl. 762. Louisiana rejects the doctrine of stare decisis. See Miami Corp. v. State, 186 La. 784, 173 So. 315 (1937); Whited v. United States, W.D. La.1963, 219 F.Supp. 947; Johnson v. St. Paul Mercury Insurance Co., 256 La. 289, 236 So.2d 216 (1970). Compare Geny, Method of Interpretation and Sources of Private Positive Law, 2d ed. Mayda Translation, § 146. But its courts have frequently expressed a policy against the wastefulness and potential injustice latent in permitting repeated relitigation of the same issues. See Quinette v. Delhommer, La. App., 165 So.2d 900 (1904), aff'd in part and rev'd in part, 247 La. 1121, 176 So.2d 399. Here Mannex has presented the same set of legal arguments on the same set of facts to the Louisiana Supreme Court. While courts exist not only to settle matters, but to settle them right, there is, and should be, an end to the time when litigants can search for different judicial views of what result

is right. Given the recency of the submission of the issue to the Louisiana Supreme Court, and the virtual identity of litigants and issues, sound policy dictates that Mannex should not be allowed to relitigate at this time.

For the above reasons the state's motion for reconsideration is granted and the plaintiff's claim for reimbursement of its 1967-1969 state property taxes is DENIED.

OPINION OF THE DISTRICT COURT

(Dated January 11, 1971; filed January 12, 1971)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AMERICAN MANNEX CORPORATION,
Plaintiff

versus

Civil Action
No. 68-1150
Section "C"

ABEL P. PREJEAN, Sheriff and Ex-Officio Tax Collector, Parish of Terrebonne, and His Successors in Office,
Defendant

Consolidated with

AMERICAN MANNEX CORPORATION,
Plaintiff

versus Civil Action
No. 70-807
Section "C"

CHARLTON P. ROZANDS, Sheriff and Ex-Officio Tax Collector, Parish of Terrebonne, Louisiana

NOAH W. CROSS, Sheriff and Ex-Officio Tax Collector, Parish of Concordia, La.

CHESTER C. BAUDOIN, Sheriff and Ex-Officio Tax Collector, Parish of St. Mary, La.

ALWYNN J. CRONVICH, Sheriff and Ex-Officio Tax Collector, Parish of Jefferson, La.

AND THEIR SUCCESSORS IN OFFICE,
Defendants

RUBIN, District Judge:

In 1966 through 1969 American Mannex paid, under protest, ad valorem property taxes on imported oil well casing to three Louisiana Parishes in which the casing was stored. The casing was shipped directly to Mannex from Canada, and stored in public warehouses in these parishes until it was sold. Mannex contends that imposition of this property tax violates the

Import-Export Clause of the Constitution.[1] The Louisiana Supreme Court rejected this argument in a state court suit to enjoin the collection of the 1966 property tax. This court has already determined that neither res judicata nor collateral estoppel prevents the plaintiff from litigating the constitutional merits of the state property taxes paid in 1967 through 1969.[2]

Brown v. Maryland, 1827, 25 U.S. 419, provides the starting point for any discussion of the Import-Export Clause's limitation on a state's taxation power. The Court, speaking through Chief Justice Marshall, there held:

> An impost, or duty on imports, is a custom or tax levied on articles brought into the country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them . . . *It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed.* . . . 'Imports' are 'things imported' . . . . They are the articles themselves which are brought into the country. 'A duty on imports', then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty (a tax on the goods) levied

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[1]No state shall, without consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

[2]American Mannex v. Rozands, 68-1150, March 10, 1970. The

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schedule of taxes paid and interest and costs accumulated was stipulated as follows:

Year	*Parish*	*Tax*	*Interest*	*Costs*	*Total*	*Dates Paid*
1967	Terrebonne	$ 9,953.65	$359.45	$1.50	$10,314.60	May 10, 1968
1968	Terrebonne	8,927.00	136.39	-0-	9,063.39	Feb. 24, 1969
1969	Terrebonne	10,635.27	200.89	-0-	10,836.16	Mar. 9, 1970
1968	Jefferson	2,206.90	441.38	-0-	2,648.28	Mar. 9, 1970
1969	Jefferson	2,091.14	209.12	-0-	2,300.26	Mar. 9, 1970
1969	Jefferson	3,720.14	372.01	-0-	4,092.15	Mar. 9, 1970
1969	Concordia	8,746.40	262.39	-0-	9,008.79	Mar. 9, 1970
1969	St. Mary	1,074.10	21.58	-0-	1,095.68	Mar. 9, 1970
	Total	$47,354.60	$2,003.21	$1.50	$49,359.31	

> after it has entered the country . . . . it is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; *but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.* (Emphasis supplied.)

The state contends that the unloading of the unpackaged steel casing followed by the sale of some of it constitutes sufficient action by the importer to render the remainder vulnerable to the tax.

It is well established that a major purpose of the Import-Export Clause "was the desire to prevent the seaboard States, possessed of important ports of entry, from levying taxes on goods flowing through their ports to inland States. It was important not to allow these States to take advantage of their favorable geographical position in order to exact a price for the use of their ports from the consumers dwelling in less advantageously situated parts of the country."[3]

Some commentators have contended that this policy should not be applied to ad valorem property taxes

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[3]Youngstown Sheet and Tubing v. Bowers, 358 U.S. 534, 556.

that do not discriminate against foreign goods. Immunizing the foreign product from the state tax may indeed provide an advantage to foreign goods over local products, for the custom duty may not be as great a burden as local taxation. Thomas Reed Powell has suggested that a literal reading of all of the import and export tax sections of the Constitution, and a consideration of constitutional history and of the peculiar nature of the property tax indicates that such taxes should not be prohibited by the Import-Export Clause. Note, State Taxation of Imports — When Does an Import Cease to be an Import, 58 Harv. L. Rev. 858, 865-6 (1945). However, it is clear that the Supreme Court has rejected these arguments and applied the Clause to the property tax. See Dept. of Revenue v. James B. Beam Distilling Co., 1964, 377 U.S. 341.

The original package doctrine has frequently served as a standard whereby it can be determined at what point the freedom from state tax ceases. Breaking the original package mingles the goods with the mass of property in the state and permits the tax. The defendant has suggested that this court ought to follow the unit-of-transportation theory that has been adopted by several state courts.[4] Under this approach, where bulky goods are shipped without enclosing them in a package, the entire lot or shipment covered by the bill of lading is regarded as constituting the original pack-

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[4]E. J. Stanton and Son v. Los Angeles County, 177 P.2d 804 (Cal. App.2d 1947); Mexican Petroleum Corp. v. City of South Portland, 121 Mex. 128; American Mannex Corp. v. Cronvich, 207 So.2d 778. Contra: Florida Greenheart Corp. v. Gautier, 172 So.2d 589 (Florida, 1965); Mexican Petroleum Corp. v. Louisiana Tax Commission, 138 So. 117 (1931).

age. Selling or unloading any part of the shipment breaks the package and makes the importer liable to the tax. See American Mannex v. Cronvich, *supra*. It is manifest that this approach ensures the taxation of all warehoused goods of bulk, free of the strictures of the Import-Export clause.

Like most fictions, the unit-of-transportation approach is result oriented. It seems designed primarily to limit the prohibition of the state property tax adopted by the Supreme Court. It is reasonable to assume that all warehoused foreign products are stacked, often by weight or grade, prior to reshipment. In many instances some of these goods will be resold in the state where the importer has stored them. That certain of these goods have a bulk that makes packaging impracticable is no reason to subject them to a tax burden not imposed on smaller goods. Since "the importer has acted upon the thing imported" similarly in either instance, the Import-Export Clause compels similar results. The unit-of-transportation phrase should not cloud this analysis, and that theory is rejected by this court. The famous doctrine of Brown v. Maryland exempts the goods so long as they remain in their "original form" or "package." Here the steel pipe was never in a package, but it remains in its original form.

Since the state has suggested no other basis for finding the imported casing within the mass of property in the state, I must conclude that this tax was an improper duty on imports. See Low v. Austin, 1872, 80 U.S. 29. The property taxes paid by the plaintiff must

be returned with interest and costs. Judgment will be prepared by the counsel for the plaintiff and submitted to the court and to opposing counsel. This opinion will serve in lieu of findings of fact and conclusions of law.

s/ Alvin B. Rubin
UNITED STATES DISTRICT
JUDGE

New Orleans, Louisiana
January 11, 1971.

OPINION OF THE DISTRICT COURT
(Dated March 10, 1970; filed March 11, 1970)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AMERICAN MANNEX CORPORATION,
Plaintiff

versus

Civil Action
No. 68-1150
Section "C"

CHARLTON P. ROZANDS, Sheriff and Ex-Officio Tax Collector, Parish of Terrebonne, Louisiana and His Successors in Office

RUBIN, District Judge:

A taxpayer, plaintiff in this suit, sought unsuccessfully in state court to enjoin the collection of Louisiana personal property taxes for the year 1966, charging that their assessment was unconstitutional. Having lost there, the taxpayer seeks a return engagement in federal court, and now attempts to recover the state property taxes paid in the years 1967 and 1968. Defendant says the fight in this arena is over before it can begin; he has moved to dismiss both for lack of jurisdiction, and on the basis that the issues have already been finally adjudicated between the parties.

In its amended complaint, plaintiff invoked federal jurisdiction under 28 U.S.C.A. § 1331, declaring that the federal question on which the controversy turns is whether the tax assessment violates Article I, Section 10, Clause 2 of the United States Constitution: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . ." As the constitutional question does appear on the face of the complaint, and the matter in controversy exceeds $10,000, this court's jurisdiction under 1331 is complete. It is therefore unnecessary to consider plaintiff's alternative assertion that jurisdiction can be based on diversity of citizenship of the parties.

No such short answer will dispose of the argument that the taxpayer may not again litigate the constitutional question decided by the state courts. In November, 1966, plaintiff sued in state court to enjoin collection of the Jefferson and Terrebonne Parish and Houma City ad valorem personal property taxes assessed against certain imported oil-well casing held by plaintiff on January 1, in those jurisdictions. In March, 1968, the Louisiana Supreme Court affirmed the Jefferson Parish District Court's decision that only those joints of imported pipe comprising unbroken shipments, as identified by the bills of lading, were held in "original unbroken packages" and not subject to tax, and that the remainder could be taxed by the state. American Mannex Corp. v. Alwynn J. Cronvich, et al, 1968, 251 La. 1014, 207 So.2d 778. Plaintiff did not seek review of this decision by the United States Supreme Court.

Plaintiff now protests that the Terrebonne Parish taxes for later years were assessed in violation of the

Import Clause of the Constitution. Defendant takes the position that the legal question — what constitutes the "original package" of imported pipe in this situation — was finally determined in the litigation over the 1966 tax liability, and that plaintiff is either barred by res judicata or estopped from reopening the issue here.

The previous judgment cannot be res judicata, as that doctrine applies only to suits based on the same cause of action, and tax refund claims for taxes assessed in successive years are separate causes of action, although the applicability of the same legal provisions to the same set of circumstances may be at issue, Alexander v. C.I.R, 5 Cir. 1955, 224 F.2d 788. But where res judicata does not apply, the broader doctrine of collateral estoppel may prevent the reopening of a question previously litigated. Particularly in tax cases, however, this doctrine has been strictly limited to situations where there has been *no change* in law or facts in the period between the first and second suits.

In Commissioner v. Sunnen, 1948, 333 U.S. 591, the principal case on finality of judgment in the tax field, the Court declared:

> [I]f the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus, the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an in-

> dependent examination of the legal matters at issue. 333 U.S. at 601.

The application of the stated rule to the facts in that case demonstrates the narrowness of the reach of collateral estoppel in a tax case. The Board of Tax Appeals had adjudicated the taxability of a contract assigning certain royalties to taxpayer's wife. Taxpayer had made various other royalty assignments to his wife, by separate contracts, that were the subject of the instant controversy. The Court held that "though those contracts are identical in all important respects with . . . the only one that was before the Board, and even though the issue as to those contracts is the same," the prior determination had no estoppel effect for the present proceeding, 333 U.S. at 602.

The situation is almost the same in the case at bar. American Mannex' property in Terrebonne Parish in 1967 and 1968 was the same kind that it held in 1966, but it was different property, involved in similar but separable commercial transactions. Plaintiff claims that the facts of its operation within the Parish changed significantly from 1966 to 1967. If proved, that may lead this court to differ from the Louisiana courts in its constitutional evaluation of the effect of the property tax assessments, or it may not. Under *Sunnen* and *Alexander, supra*, American Mannex is entitled to make the attempt, at any rate.

For these reasons, the motions to dismiss will be denied.

s/ Alvin B. Rubin
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
March 10th, 1970.

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2739

D. C. Docket No. 68-1150 & 70-807

AMERICAN MANNEX CORPORATION,
Plaintiff-Appellant,

versus

CHARLTON P. ROZANDS, ETC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before WISDOM, GOLDBERG and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1972

Issued as Mandate:

ORDER OF THE COURT OF APPEALS DENYING REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2739

AMERICAN MANNEX CORPORATION,
Plaintiff-Appellant,

versus

CHARLTON P. ROZANDS, ETC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(August 22, 1972)

ON PETITION FOR REHEARING

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.